

INI BEFORE THE  
TENNESSEE STATE BOARD OF EQUALIZATION

<i>In Re:</i>	WAY-FM Media Group, Inc. )	
	District 8, Map 62G, Group A, Control Map 62G, )	
	Parcels 12.05 and 12.05P, Special Interest 000 )	Williamson County
	<i>Claim of Exemption</i> )	

INITIAL DECISION AND ORDER

Statement of the Case

This is an appeal pursuant to Tenn. Code Ann. section 67-5-212(b)(2) from the denial of applications for exemption of the subject property from ad valorem taxation. The applications were filed with the State Board of Equalization ("State Board") on May 11, 2004. State Board staff attorney Sabrina Williams notified the applicant of her denial of the applications in a six-page letter dated August 12, 2005. WAY –FM Media Group, Inc. ("WAY-FM"), the applicant, appealed this initial determination to the State Board on November 2, 2005. The undersigned administrative judge conducted a hearing of this matter on January 8, 2007 in Nashville. WAY-FM was represented by Frank C. Ingraham, Esq., of Ingraham & Pautienus (Nashville). Williamson County Assessor of Property Dennis Anglin appeared on his own behalf.

Findings of Fact and Conclusions of Law

WAY-FM, a Florida nonprofit corporation now headquartered in Colorado Springs, Colorado, avowedly exists "to encourage youth and young adults in their Christian lives and to introduce non-believers to Christ." Internal Revenue Service Form 990 (2005), Statement 7. In this proceeding, WAY-FM renews its plea for what has turned out to be an elusive property tax exemption for the corporation's flagship "Christian hit radio" station in the Nashville suburb of Franklin ("WAY-FM Nashville"). Most recently, the Assessment Appeals Commission upheld (former) Administrative Judge Helen James' denial of such exemption on the ground that WAY-FM did not qualify as a "religious institution" under Tenn. Code Ann. section 67-5-212. "We do not believe," the Commission concluded, "a religious institution can be found in that which primarily serves a business purpose." WAY-FM Media Group, Inc. (Williamson County, Final Decision and Order, August 12, 2002), p. 4. WAY-FM petitioned the Williamson County Chancery Court for review of that decision pursuant to Tenn. Code Ann. section 4-5-322<sup>1</sup>;

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<sup>1</sup>WAY-FM Media Group, Inc. v. State Board of Equalization, et al, Williamson County Chancery Court No. 29250.



however, by mutual agreement of the parties, the matter was held in abeyance pending the outcome of these latest applications.

WAY-FM's quest for property tax-exempt status in this state actually dates back almost 15 years. WAY-FM Nashville, which holds a noncommercial educational broadcast license issued by the Federal Communications Commission (FCC), went on the air on March 11, 1992. At that time, the station was operating out of leased space in the Brentwood area. WAY-FM's 1993 and 1994 applications for exemption of the personal property used (or held for use) at that location were denied by the State Board.

On April 24, 1998, WAY-FM purchased the 0.67-acre parcel in question. Buoyed by a successful capital campaign, the organization erected on this site an approximately 7,000-square-foot "Ministry Center" that houses WAY-FM Nashville.<sup>2</sup> The formal dedication of this facility occurred on November 11, 1999.

As of March 12, 2005, WAY-FM employed 73 persons. Each of these persons must subscribe to the evangelical "Statement of Faith" adopted by WAY-FM's board of directors and contained in its current Employee Handbook. Employees of WAY-FM are also expected to attend a local Christian church of their choice. WAY-FM permits its employees to make "limited" use of production facilities for the benefit of other organizations – including for-profit entities.<sup>3</sup> Employee Handbook, p. 35.

According to the Employee Handbook (p. 7), WAY-FM founder Robert D. Augsburg and his wife Felice were "dedicated to putting their best foot forward right from the start, knowing that the younger audience would never be attracted to a station that sounded inferior to the mainstream Pop stations in town." WAY-FM currently operates 14 full-power radio stations, mostly clustered in the southeastern United States. The Employee Handbook (p. 8) notes that "[b]ecause Nashville is home to most of the Contemporary Christian music artists, record labels and publishing companies, the (Nashville) station was well received immediately." Indeed, in the opinion of both Judge James and the Assessment Appeals Commission, WAY-FM Nashville had effectively become part of this growing segment of the music industry.

Before the undersigned administrative judge, Mr. Ingraham self-deprecatingly took the blame for WAY-FM's past administrative defeats. Despite the voluminous record in those

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<sup>2</sup>In tax year 2006, the Assessor valued the subject real property (as improved) at \$850,000.

<sup>3</sup>In their Memorandum of Facts and Law before the Assessment Appeals Commission (p. 4), counsel for the appellant represented that "[t]here is no third party lease [sic], officer, director or staff, use of WAY's real or personal property."



proceedings, the veteran attorney lamented, he had somehow failed to demonstrate the “faith aspect” of WAY-FM’s so-called ministry.<sup>4</sup>

The WAY-FM personnel who were called to testify at the day-long hearing repeatedly sounded the theme that the network’s rock-oriented programming was merely the “hook” – i.e., the primary means by which WAY-FM seeks to bring the younger generation into the fold. Neither WAY-FM nor its employees, these witnesses stressed, receive any compensation for airplay, record sales, or promotions. Network program director David Senes asserted that all of the recording artists played on WAY-FM stations are themselves Christians “to the best of our knowledge.” Further, song lyrics are carefully screened for conformity with WAY-FM’s Biblical perspective, creating what disc jockey Jeff Brown described as a “24/7 worship experience.”

As an educational broadcast licensee, WAY-FM Nashville is required by the FCC to broadcast certain information of public interest (e.g., news and weather). Music does not consume all of the station’s discretionary airtime; the recordings are interspersed with live call-ins, vignettes, commentaries, and hourly scripture readings (*Word on the WAY*). Mr. Brown contrasted the sort of dialogue heard on the station’s “Jeff and Stace” morning show with the vulgarities in which some of its competitors have indulged. WAY-FM Nashville’s more uplifting content, he proudly reported, had elicited many testimonials from the station’s listeners. WAY-FM Nashville also encourages its listeners to “put faith into action” by participating in mission trips and other charitable causes.

Dick Wells, Executive Pastor of The Peoples Church (a/k/a First Baptist Church of Franklin), Josh Phillips, Middle School Pastor of the First Baptist Church of Clarksville (where another WAY-FM radio station is located), and Gary Woodard, former Youth Minister of the Bellevue Baptist Church, viewed WAY-FM as an extension of the church that helps to sustain its message. Citing the historical role of music in religion, they observed that a number of the songs incorporated into their regular worship services were played on WAY-FM stations.<sup>5</sup> These clergymen also lauded the free WAY-FM “Brown Bag Concerts” (by contemporary Christian artists) which they had hosted and/or attended in their respective churches. To Reverend Phillips, WAY-FM radio represented a “safe” alternative for America’s youth in the ongoing battle against the satanic influence he perceived in certain forms of secular music.

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<sup>4</sup>Counsel offered a strikingly similar *mea culpa* in his PETITION OF APPEAL of Judge James’ unfavorable initial order, which he attributed to “a total failure of the presenters of WAY-FM’s mission to portray its biblical doctrine.” At the hearing before her, WAY-FM called six witnesses and introduced 33 exhibits.

<sup>5</sup>WAY-FM volunteer and two-time cancer survivor Rachel Terry added that, among the younger members of her church, songs aired on the radio tended to generate the strongest response.



WAY-FM Nashville holds two four-day fundraisers on the air every year. Individual donations account for over half of WAY-FM Nashville's annual revenue, with the remainder coming mainly from "business impact partners" (underwriters) recruited by the station. WAY-FM Nashville also derives some revenue from the net proceeds of concerts and other special events sponsored by the station.

WAY-FM is a corporate member of the Gospel Music Association (GMA), a Nashville-based organization devoted to the spread of gospel music. A number of individuals employed by WAY-FM belong to the GMA as well.

Taking exception to the finding that WAY-FM "broadcasts music of a general religious nature for public consumption," WAY-FM Media Group, Inc. (Williamson County, Initial Decision and Order, October 31, 2001), p. 8, counsel for the appellant insisted that it strives to propagate a specific set of doctrines. Hence, in his opinion, WAY-FM was no less entitled to a "religious" exemption of its property than were the victorious claimants in Bible Broadcasting Network (Davidson County, Initial Decision and Order, January 13, 1994) and Cumberland Communications Corporation (Grundy County, Initial Decision and Order, April 23, 1997).

Article II, section 28 of the Tennessee Constitution permits the legislature to exempt from taxation property which is "held and used for purposes purely religious, charitable, scientific, literary, or educational." Under this authority, the General Assembly has decreed that:

There shall be exempt from property taxation the real and personal property, or any part thereof, owned by any religious, charitable, scientific, or nonprofit educational institution which is occupied and used by such institution or its officers purely and exclusively for carrying out thereupon one (1) or more of the purposes for which the institution was created or exists....

Tenn. Code Ann. section 67-5-212(a)(1)(A). The legislature further provided, however, that:

The real property of any such institution not so used exclusively for carrying out thereupon one (1) or more of such purposes, but leased or otherwise used for other purposes, **whether the income received therefrom be used for one (1) or more of such purposes or not**, shall not be exempt....

Tenn. Code Ann. section 67-5-212(a)(3)(B). [Emphasis added.]

In the context of the quoted statute, the phrase *purely and exclusively* has been construed to mean that the property in question must be put to a use which is "directly incidental to or an integral part of" an exempt purpose of the institution. Methodist Hospitals of Memphis v. Assessment Appeals Commission, 669 S.W.2d 305 at 307 (Tenn. 1984).

In this state, contrary to most other jurisdictions, property tax exemptions are liberally construed in favor of religious, charitable, scientific, and nonprofit educational institutions. See, e.g., Christian Home for the Aged, Inc. v. Tennessee Assessment Appeals Commission, 790 S.W.2d 288, 291 (Tenn. Ct. App. 1990). Nonetheless, as the party seeking to change the initial



determination on its applications for exemption, WAY-FM has the burden of proof in this administrative proceeding. State Board Rule 0600-1-.11(2).

Youth Programs, Inc. v. State Board of Equalization, 170 S.W.3d 92 (Tenn. Ct. App. 2004) involved a “501(c)(3)” corporation which produced an annual professional golf tournament in Memphis and donated the net proceeds to the St. Jude Children’s Research Hospital. On appeal from the denial of an application for exemption of the property used in connection with that event, the undersigned administrative judge held that the corporation was “fundamentally engaged in a business enterprise,” and that Tenn. Code Ann. section 67-5-212(a)(3)(B) “does not permit exemption of property that is used so overtly for commercial purposes.” Youth Programs, Inc. (Shelby County, Initial Decision and Order, September 17, 2001), p. 3. The Assessment Appeals Commission affirmed that ruling. Youth Programs, Inc. (Shelby County, Final Decision and Order, April 30, 2002).

Upon judicial review, in spite of the substantial prize money, ticket sales, concessions, marketing, and advertising associated with the PGA golf tournament, the Tennessee Court of Appeals determined that “Youth Programs is not...a revenue-generating organization in a commercial sense.” Youth Programs, Inc. v. State Board of Equalization, 170 S.W.3d 92 at 104 (Tenn. Ct. App. 2004). Rather, the court concluded, the organization was entitled to exemption of the land in question because it “is a charitable institution organized to raise funds for other charities” and “undisputedly uses its property...for its institutional purpose.” *Id.* at 104-105.

“WAY-FM is no more part of the music industry,” Mr. Ingraham asserts, “than Youth Programs was part of the sporting event industry.” Memorandum of Law, p. 6. To be sure, the ultimate objectives of radio broadcasters are different from those of record companies, recording artists, music publishers, and songwriters. Yet, as both WAY-FM and the GMA obviously recognize, radio stations have always been a vital artery in the music machine. Historically, record companies and artists have concentrated mightily on gaining acceptance at radio; and music publishers and songwriters have accrued much of their income from performance royalties. In turn, music-oriented stations such as WAY-FM depend on the industry to turn out product suitable for their respective formats. Moreover, WAY-FM is undeniably part of the radio broadcasting industry.

In World Evangelistic Enterprise Corporation v. Tracy, 96 Ohio App.3d 78, 644 N.E.2d 678 (June 29, 1994), the Ohio Court of Appeals considered whether a Christian radio broadcast facility was a “house used exclusively for public worship” within the meaning of that state’s property tax exemption statute. The station’s programming included “a Sunday morning worship service from a church in Chicago, inspirational music, devotional prayers, youth programs with biblical and spiritual themes, Bible teaching programs, and activity



announcements.”<sup>6</sup> 644 N.E.2d at 679. Mindful of an Ohio Constitutional provision barring preference of any “religious society,” the Court granted the exemption on the rationale that “[t]he broadcast and reception constitute a form of public worship and the persons who participate in those exercises constitute a religious society.” 644 N.E.2d at 681.

Likewise, eligibility for a “religious” property tax exemption in the state of Tennessee is not restricted to traditional churches or denominational organizations. See, e.g., Ankerberg Theological Research Institute (Hamilton County, Final Decision and Order, November 24, 1992); Trinity Christian Center of Santa Ana, Inc. d/b/a Trinity Broadcasting Network (Sumner County, Initial Decision and Order, July 9, 1999). Indeed, the undersigned administrative judge observed in American Family Association, Inc. (Madison County, Initial Decision and Order, January 18, 2002) that:

Through radio, television, and other electronic media, faith-based organizations may now communicate with a virtually unlimited number of supporters and contributors. While a religious broadcaster’s listeners may not constitute a readily identifiable “congregation” like members of a church, they are no less vital to the survival of the organization.

*Id.* at pp. 3—4.

But in Book Agents of the Methodist Episcopal Church, S. v. State Board of Equalization, 513 S.W.2d 514 (Tenn. 1974), the Supreme Court of Tennessee declared that:

The publishing and printing of books for the general public, **even though the subject matter of such books is religious**,...is not within the statutory exemption. [Emphasis added.]

513 S.W.2d at 524.

This pronouncement proved to be critical in the American Family Association case. There, a Mississippi nonprofit corporation (formerly known as the “National Federation for Decency”) which owned a network of Christian radio stations sought exemption of the personal property used in the operation of its Jackson, Tennessee affiliate. Like WAY-FM Nashville, that station was licensed by the FCC as a noncommercial educational broadcaster. While acknowledging that “persons may be spiritually uplifted or even guided to some degree by Christian music,” the undersigned administrative judge rejected the notion that “in playing recordings intended for commercial distribution, the station is carrying on a ministry.” *Id.* at p. 5. He opined that:

Viewed more objectively, the music aired on WAMP is a form of entertainment that serves as an inducement for contributions – on which the viability of AFA ultimately depends. The Christian artists, for their part, rely on the station for exposure of the records

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<sup>6</sup>It is doubtful whether recorded music accounted for the lion’s share of WEEC’s programming, as it does on WAY-FM Nashville.



that they hope to sell in competition with purveyors of secular music. Meanwhile, WAMP vies with commercial radio stations for the greatest possible share of the listening audience....The State Board must be especially sensitive to the appearance of subsidizing one segment of a highly competitive industry or trade based on the religious beliefs of the persons engaged in it.

*Ibid.*

The Assessment Appeals Commission affirmed this decision, finding that “the broadcast use of this property is at best of a generally religious character not unlike the general religious character of the publishing activities denied exemption in *Book Agents*.” American Family Association, Inc. (Madison County, Final Decision and Order, June 25, 2003), p. 2. The Commission concluded:

We are quick to concede there is much in our culture that needs battling, and many traditional religious institutions call their adherents to these battles from the pulpit or otherwise. **On the other hand we find no support in this case or experience for extending the property tax exemption for religious institutions so far beyond the house of worship.**

*Id.* at p. 3. [Emphasis added.]

For whatever reason, the record in WAY-FM's previous appeal apparently did not include the “Statement of Faith” that was highlighted in this proceeding.<sup>7</sup> The administrative judge cannot legitimately infer, however, that the Assessment Appeals Commission would have reached a different conclusion in the case but for the lack of a specific reference to the Apostles' Creed. In all other meaningful respects, the documentary evidence in this proceeding closely tracks that which was submitted to the Commission. Further, Judge James had clearly indicated in her initial order that WAY-FM's professed criteria for lyrical content were based on “evangelical Christianity.” Although one might quarrel with the Commission's characterization of WAY-FM as a component of the music industry *per se*, that does not negate its finding that “the primary effect of (WAY-FM's) operation is promotion of contemporary Christian music.” WAY-FM Media Group, Inc. (Williamson County, Final Decision and Order, August 12, 2002), p. 4.

Arguably, inasmuch as the Book Agents case dealt with the issue of whether certain property was being *used* for religious purposes, it affords no support for the conclusion that WAY-FM does not qualify as a religious *institution*. But this point is merely academic; for the Assessment Appeals Commission was plainly not convinced that the subject property was used “purely and exclusively” for religious purposes.

Despite the evident sincerity and conviction of the WAY-FM and church representatives who testified at the hearing, nothing in the record suggests that the appellant's claim of religious exemption is superior to that which was rejected by the Assessment Appeals Commission in

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<sup>7</sup>The record in this case does not reveal exactly when the “Statement of Faith” was formally adopted by WAY-FM's board of directors.



American Family Association. In the mind of the administrative judge, then, the only remaining question is whether the Youth Programs case – which was decided thereafter – mandates a different result.

To say the least, Youth Programs did unsettle some longstanding agency interpretations of this state's property tax exemption law. Notwithstanding the quoted provisions of Tenn. Code Ann. section 67-5-212(a)(3)(B), the Youth Programs court seemingly placed more emphasis on the use of the *proceeds* of an exempt institution's revenue-generating activities than on the activities themselves. Having determined that Youth Programs met the extremely broad definition of a "charitable institution" in Tenn. Code Ann. section 67-5-212(c), the court inquired only whether the corporation's conduct of a professional sports event was *ultra vires* – not whether the property in question was actually used "purely and exclusively" for an exempt purpose. Compare, e.g., First Presbyterian Church of Chattanooga v. Tennessee Board of Equalization, 127 S.W.3d 742 (Tenn. Ct. App. 2003).

In any event, the Youth Programs decision certainly cannot be read in derogation of the higher Court's ruling in Book Agents. Nor is Youth Programs of any particular avail to WAY-FM on the threshold issue of whether it qualifies as a *religious* institution under Tenn. Code Ann. section 67-5-212(a)(1)(A). Insofar as it is germane to the instant case, Youth Programs stands only for the proposition that a claim of property tax exemption is not necessarily precluded if the owning institution: (a) engages in activities similar to or in competition with tax-paying businesses; and (b) as a result, confers substantial economic benefits on parties other than those purportedly served by the institution.

Presumably, the Assessment Appeals Commission was well aware at the time of its WAY-FM decision that the presence of competition with tax-paying businesses is a relevant – not determinative – factor in the resolution of property tax exemption cases. This principle, after all, had been enunciated by the Book Agents Court many years earlier. Furthermore, whereas Youth Programs only staged one event a year, WAY-FM Nashville's "Christian hit radio" format poses potential competition for secular radio stations every day.

Perhaps misguidedly in the eyes of the Youth Programs court, the Assessment Appeals Commission did focus much of its attention on the business aspects and ramifications of WAY-FM's network. But apart from purely commercial considerations, in the initial order affirmed by the Commission, Judge James had addressed WAY-FM's attempt to distinguish its programming as follows:

Under WAY's musical criteria the lyrics of any song must somehow refer to God or a Biblical principle. However, such references do not make a radio station a religious institution. Christians, like non-Christians, seek entertainment that supports their values. WAY provides that entertainment for members of the general public who enjoy its musical style.



WAY-FM Media Group, Inc. (Williamson County, Initial Decision and Order, October 31, 2001), p. 7.

Respectfully, after reviewing the extensive record in this proceeding, the administrative judge is inclined to the same conclusion. Given the paramount importance of contemporary Christian music in WAY-FM's efforts to reach a youthful demographic, a contrary view could not justifiably be predicated on the "spoken word" portions of the network's programming. To suppose that many young people tune into WAY-FM Nashville mainly to hear those segments and interludes would probably be no more plausible than to suggest that most adult males buy *Playboy* magazine primarily to read the articles.

It is appreciated that WAY-FM does not allow its music programming to be dictated entirely by the priorities and whims of record companies. Yet, in the end, the administrative judge cannot assent to the idea that a listener who – however haphazardly or fleetingly – lands on WAY-FM Nashville's spot on the radio dial has entered the functional equivalent of a house of worship.

#### Order

It is, therefore, ORDERED that the subject property shall not be exempt from ad valorem taxation.

Pursuant to the Uniform Administrative Procedures Act, Tenn. Code Ann. §§ 4-5-301—325, Tenn. Code Ann. § 67-5-1501, and the Rules of Contested Case Procedure of the State Board of Equalization, the parties are advised of the following remedies:

1. A party may appeal this decision and order to the Assessment Appeals Commission pursuant to Tenn. Code Ann. § 67-5-1501 and Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization. Tennessee Code Annotated § 67-5-1501(c) provides that an appeal **"must be filed within thirty (30) days from the date the initial decision is sent."** Rule 0600-1-.12 of the Contested Case Procedures of the State Board of Equalization provides that the appeal be filed with the Executive Secretary of the State Board and that the appeal **"identify the allegedly erroneous finding(s) of fact and/or conclusion(s) of law in the initial order"**; or
2. A party may petition for reconsideration of this decision and order pursuant to Tenn. Code Ann. § 4-5-317 within fifteen (15) days of the entry of the order. The petition for reconsideration must state the specific grounds upon which relief is requested. The filing of a petition for reconsideration is not a prerequisite for seeking administrative or judicial review.



This order does not become final until an official certificate is issued by the Assessment Appeals Commission. Official certificates are normally issued seventy-five (75) days after the entry of the initial decision and order if no party has appealed.

ENTERED this 28<sup>th</sup> day of March, 2007.



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PETE LOESCH  
ADMINISTRATIVE JUDGE  
TENNESSEE DEPARTMENT OF STATE  
ADMINISTRATIVE PROCEDURES DIVISION

cc: Frank C. Ingraham, Attorney, Ingraham & Pautienus  
WAY-FM Media Group, Inc.  
Dennis Anglin, Williamson County Assessor of Property

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